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exhibited, especially perhaps in tragedy, in the case of great and outstanding personalities. The skill of the dramatic artist in large measure consists in his careful selection of his characters and situations for the purpose of conveying dramatic effect. But the dramatic situation is inseparable from human life, not only in all its forms but in all its stages. This is acknowledged when we speak of the tragedies and comedies of child-life. And it appears historically in the incessant reappearance in literary form of dramatic presentations of life at the lowliest levels of human existence.

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ETHICS AND LAW.

CHARLES W. SUPER.

“SINCE law is subordinate to ethic, or, in other words, since both those who command and those who obey are bound morally to regard, in the last resort, the commands of the moral law, it follows that the ultimate ends of law are suspended upon that of ethic, deducible from it, and justifiable by it. The logic of law is a reproduction of that of ethic, but applied to overt acts only.” The scholarly author of “The Theory of Practice” has no doubts on the relation of law to ethic, a position which he believes to have established in other parts of his work. He declares further that there is continually in progress an alteration or conflict “and at every step of it, the appeal always lies from the law to the principles and logic of ethic.” Surely, this “is a hard saying: who can hear it?” It is perhaps true that a good deal of modern legislation has an ethical end in view; but the history of legislation is very far from bearing out the assertion of Mr. Hodgson. In organized society there is in progress now, as there has always

been, a continuous struggle between those who have and those who have not but desire to have. Almost everyone has an opportunity to study at first hand legislation on a small scale, in the various ordinances that are passed by municipal councils. It is seldom that ethical grounds are urged in favor of any proposed measure or are the decisive factor in its enactment. The reasons put forth are justice and expediency, usually the latter. In larger legislative bodies the same arguments that we find current in the smaller ones are alleged over and over again. We may say that the chief characteristic of an ethical act or of ethical conduct is that it aims at a remoter rather than an immediate good, and that in any event the elected course can injure no one. The man who postpones taking vengeance upon an enemy for the reason that it will be more terrible for the delay puts off what to him is a remoter good when placed alongside a nearer one; but he would in this way inflict an injury of the larger number if his example were followed by others. "Do unto others as if you were the others." "What you would not have done to yourself, do not unto anyone else." "Deal with your fellow-man as you would have him deal with you." "So regulate your actions that they may be taken as a rule for the guidance of all men." These and similar dicta may be accepted as maxims of ethical conduct and criteria of the same. How few men can rise to the largeness of vision which they demand! Still fewer are they who can put such magnanimous maxims into actual practice. We may approve and admire what we have not the strength of will to carry into effect. It is probable that in the domain of ethics no confession has been more frequently made than that of weakness of will in the presence of clear moral discernment. By far the larger part of legislation has in the very nature of the case no moral quality, and cannot have. In this respect it is a counterpart of life. A great portion of our lives is occupied in eating and sleeping. They are essential to our physical exist-

ence. In themselves they are neither right nor wrong: it is only when indulged to excess that they become immoral. Similarly, by far the greater portion of every body of laws deals with affairs that are neither right nor wrong, and have nothing to do with justice or injustice: they are simply expedient or inexpedient. When law represents the convictions or aspirations of a democracy, its animus is usually more nearly ethical than where it is the decree of an autocrat or a clique. Apparent exceptions are, however, not always real; for the autocrat who is at the top of the political ladder may represent and give force and effect, through law, to the aspirations of those who are at the bottom. In all cases, however, law is behind public opinion; usually it is far in the rear. Customs and ideas are often as carefully heeded as if they were statutes, although everybody is perfectly free to ignore them. The moral convictions of prescient individuals are frequently millenniums in advance of the mass of mankind. These are often diametrically opposed to current theory and practice. We have a conspicuous instance in the doctrines and fate of Socrates. He maintained that one ought never to do wrong, or, conversely, that one ought always to do right, and that the relation of parties to each other did not alter the intrinsic worth of an act. He based his belief on the existence of an intrinsic value in ethical conduct. It is doubtful whether any man before him held and defended this doctrine with the insight and pertinacity shown by him. He was condemned, not by a court of law but by a legislature. We may say that a special act was passed for the purpose of making him a law-breaker. He realized the loneliness of his position and clearly expounded it to those who had his life in their power, notwithstanding the apparent egotism of his assertion. Similar cases have occurred here and there in the past, although none of equal prominence. A later instance of remarkable foresight is the edict of tolerance issued by Henry IV of France. Its wisdom is becoming more and more

evident as time goes on, notwithstanding that it is still far from being observed in many parts of the world. In fact it is nowhere fully in vogue, even as to non-essentials. To everyone who is able to form a conception of man's relation to Deity and of the impenetrable veil that intervenes between us and the invisible world there is no attitude of mind so intrinsically unreasonable as the intolerant. Its intensity is generally in proportion to ignorance. What is the explanation? It seems to be this: In every primitive state of society there prevails a dead level of uniformity. Everything is done according to use and wont. There are no nonconformists and no dissenters. This continues longest with respect to those relations that are supposed to exist between man and the higher powers. He who dares to think and act differently from the mass disturbs these relations and invites disaster upon the tribe. Owing to man's ever-present consciousness of his weakness before the forces of nature, he is nervously suspicious of everyone who acts in such a way as to disturb the established order of events. At this early stage of society, men are too ignorant to take any account of what man thinks as long as it is not translated into actions. Hence he who refuses to conform outwardly to established and inherited customs is a dangerous person.

We find, for example, that the medieval church was concerned only about conformity to an established ritual; it took little account of beliefs. The Italian Humanists were almost all rationalists of an extreme type besides being men of loose lives. But as they outwardly practiced the ceremonies prescribed by the church, the hierarchy did not molest them. There was a rational excuse for the persecutions against the Christians sanctioned by the Roman emperors. When the head of the state was regarded as the divine embodiment of its underlying and sustaining principle, the citizen who refused to do him homage was at least constructively a traitor. On the other hand the French Protestants never wearied in

assuring the king of their loyalty and devotion; but because they refused to conform to the usages of the established church they were branded as undesirable citizens and maltreated in every imaginable way. In such cases the influence of the hierarchy which feels that its craft is in danger counts for a good deal.¹

The history of slavery exhibits in a striking way the length of time that may elapse between the first enunciation of an opinion or a doctrine and its final acceptance by the majority of mankind. It has been an established institution from the earliest times, and still exists. Yet the founder of the Stoic school seems to have been the first man to recognize its injustice. That many of his disciples came to hold the same view is evinced not only by their professions but also by the frequency of manumission among them, especially in Rome. Albeit no propaganda was undertaken against it; even the New Testament is virtually silent on the subject. After existing in one form and another throughout the Middle Ages, it assumed a new guise with the beginning of the African trade in human beings. In England some of the smaller sects, notably the Quakers, opposed it on ethical grounds, but not until the appearance of Wilberforce, Clarkson, Macaulay and others in the arena did a general movement for its abolition begin. This result

¹How natural it is even for persons of some intelligence to resent a departure from use and wont was strikingly illustrated in an instance that came under my observation some years ago. It exhibited the germ which has so often developed into the most vindictive persecution. A young lady from the middle West changed her residence to New England. Intentionally or inadvertently she acquired some peculiarities of pronunciation, which she brought with her on a visit among her former associates. One of these remarked to me that he was disgusted with Miss M. for discarding the English of her earlier years. I have noticed the same thing among German peasants, when one of their number, through residence in another district, acquires a mode of speech different from that which he learned in childhood. An oft-quoted proverb among them is: "Talk as your bill grew." When an innovation in a wholly unimportant matter is resented, how much more vigorously will this be done in essentials!

was chiefly due to the growth of humanitarian sentiments, of which the Wesleyan revival was the most marked evidence. As is well known, its chief promoter declared that "slavery is the sum of all villainies." It is generally admitted that it virtually died out in the northern states before it was legally abolished, experience having proved that it was unprofitable. Here, at least, ethical motives had little influence in the movement. The same thing may be affirmed of the liquor traffic. The most frequently heard arguments both for and against it are economic. Only a very small number of persons hold that it is a sin to drink alcoholic liquors in any quantity, however small. Ethical considerations play a very insignificant part in the controversy.

That ethical progress is social rather than statutory is convincingly shown by the terminology we find in some languages. The evidence is unconscious and unintentional, therefore all the more convincing. *Sitten* in German means custom, use and wont, pure and simple. Manners and customs are *Sitten*; but neither the English nor the German predicates any moral quality. On the other hand, when we say that certain practices are *Unsitten* or *unsittlich*, we put into them a signification which they have in modern speech but which they did not originally contain. Although the moral concepts are not engendered by social life, they are developed under social conditions. We further see this in our word "moral," which is merely a repetition of what we saw in the German terms above cited. It is derived from *mos*, *mores*. Cicero says distinctly that *moralis* pertains to *mores*. It has, therefore, only the remotest connection with our English term "morals," while *moralitas*, the ancestor of "morality," does not occur in classical Latin.

The wide divergence between public opinion and statute law is strikingly shown by the popular attitude, in Anglo-Saxon countries, toward certain forms of sexual immorality. The law makes no distinction between a common

murderer and him who slays the dishonorer of wife or daughter. Yet it rarely happens that a jury will convict a criminal of the latter class. Even when a husband kills the accepted paramour of his wife, few juries will find him guilty of murder. There is reason to believe that both the South Europeans and the Slavs are more lenient in this regard than the Germanic peoples. Testimony in matters of this kind, when intentional, is usually open to suspicion; but persons who have had opportunities for obtaining evidence on this point at first hand are for the most part unanimous. Moreover, passages here and there in literature bear in the same direction. In this matter the ancient Romans under the Empire were more lax than the Greeks, and far more so than under the Republic. The irregular *liaisons* of the Roman matrons are matters of frequent remark both by the historians and the satirists. Plutarch, however, regards the adultery of a wife as an annoyance that is to be borne by the philosopher with as little perturbation of mind as possible. So far as we have evidence, herein lies almost the only difference between the ethical system of Socrates and that of the most advanced nations of modern times. If we may trust Xenophon, he did not even regard courtesans as a necessary evil, but rather as an indispensable class in the body politic. While in some European countries the law goes so far as to recognize the harm that may arise from this class of persons, it proceeds no farther than regulation. On the other hand, in Germanic lands regulation is not attempted, all efforts of legislation being directed toward suppression. The ancient point of view is that sexual irregularities partake of the nature of contract or bargain and sale, to which both parties consent, and that there can therefore be no wrong or injustice. Although harlotry was forbidden to the daughters of Israel, prostitution was in general vogue all over the East. Both Charlemagne and Frederick Barbarossa issued severe edicts against it, but they do not appear to have had much effect. The Cru-

sades had a very deleterious influence upon the sexual morality of western Europe. It is said that the Council of Constance, in 1414, brought together fifteen hundred courtesans. For centuries before and after the commencement of the modern era, most of the German municipalities were constantly engaged in legislation designed to restrict the evil. There is no evidence that much was accomplished. The sale of indulgences had a particularly harmful effect in this respect. A general and gradual improvement took place, not as the result of legislation but in common with the general progress of enlightenment. We frequently come across the assertion that you cannot make men moral by legislation. It is usually made by persons who appear to think they are uttering a weighty thought. In reality it is mere nonsense. The object of law is not to make men moral, but to keep them from injuring one another. Wherever the object of law is to make men moral it fails of its object; therefore, in order that men may become moral there should be no legislation. This is about the sort of anarchy preached by Tolstoy. With men as they are, a society without some law, written or unwritten, could not exist. The object of law is to protect me in life and property, not to keep my enemy from desiring to kill or maim me or from coveting my possessions. Selfishness is such a powerful motive in the human breast that almost all legislation is directed against its outward expression in action. It is a curb designed to retain every man within a circumscribed sphere of activity. It does not inquire about motives; to do so would be rank folly. Hallam says somewhere that we literally live among the snares and pitfalls of law. Yet the fact is patent to every reader of history who reflects, that its whole course is strewn right and left with repealed or ignored or evaded laws. The statute books of a nation are no trustworthy guide to its morals or even its justice. Probably the best test of the moral quality of an act is the degree of its unselfishness or the measure of the in-

tensity by which the actor elects an immaterial to a material interest. All that a man hath, that is, all his possessions, will he give for his life; if then he gives life itself, either in service to his fellow-men or as a direct sacrifice or for a cause that will better them, what more can he do? It is conceivable that a deed may be ethical from the view point of the doer; that is, it may be prompted by a purely unselfish motive which would be unethical if adopted as a rule of universal conduct. This seems to have been the interpretation given by the ancient Jews in the case of Abraham's willingness to sacrifice his son in obedience to what he believed to be his duty. As a historical fact the incident has no value, but the manner in which the New Testament writers deal with it is instructive. They call it faith. Faith, however, is not necessarily ethical. A man may invest in an uncertain enterprise because he has faith that it will prove remunerative. It is nevertheless a factor in all ethical conduct, since it invariably has regard to the future more than the present.

Justice is essentially a virtue of organized society. It is the abstract expression for something which we claim as belonging to us but which is often denied us by others. We sometimes hear men speak of being unjust to themselves. This is rather a figure of speech than an expression of actual feelings. Conversely, ethics is the abstract term for a personal virtue: it is individual excellence. Ethics takes little account of other people's opinion, because it is based on personal conviction. Hence the law cannot compel men to act from ethical motives. It can take cognizance only of conduct, not of what may be called "secret sins." When Jesus said, "Whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart," he was speaking of an unethical motive. The state of mind to which he had reference cannot be prevented by law. In like manner it may be said that the man who is honest only so far as the law constrains him is essentially dishonest.

Under circumstances where the fear of the consequences of a dishonest act does not deter such a person, he yields to temptation and becomes a moral criminal. It is the strong sense of a personal obligation to a power "not ourselves that makes for righteousness" which characterizes the ethical man. That the "not ourselves" may be impersonally conceived does not necessarily impair the force of the felt obligation, for it is well known that atheists have occasionally acted from the highest possible motives. They could probably give no other reason for them than that given by Herbert Spencer for abhorring cruelty: they could not help it. A man of this stamp, when brought face to face with temptation, does not say, with Joseph, "How then can I do this great wickedness, and sin against God?" but, "How can I sin against my highest conceptions of duty?" The law may be a terror to evildoers: it cannot deter men from thinking evil. The end for which the state exists (and legislation is the state acting in its corporate capacity) is justice, not ethics. Aristotle has observed that man alone has a sense of justice and injustice. He has a conception or innate idea of the reciprocal obligation existing between every man and his fellow-man. Man learned by experience that the attainment of justice is easier for him in his collective capacity than when acting individually or even in small groups; hence he unconsciously formed the state and instituted government. This idea is well illustrated by the story found in Herodotus. It may have a very slight foundation in fact, but it sets forth the Greek view, and is probably true to experience. A certain Deioces, who was a man of mark in his own village, "applied himself with greater zeal and earnestness than ever before to the practice of justice among his fellows. It was his conviction that justice and injustice are engaged in perpetual war with one another." Owing to his singular uprightness, all the surrounding villages had recourse to him in their quarrels and suits. After a while, however, he refused to sit in judgment on the

affairs of others to the neglect of his own. Thereupon lawlessness broke out afresh. Then the Medes assembled from all quarters and declared that they could not live thus any longer. They desired a king to save them and their country from anarchy. The friends of Deioeces presented his claims with such force that he was chosen to fill the office. Herodotus then informs us what the newly elected king required of his subjects, and adds that he continued to administer justice as before, although his mode of procedure was different. This story is parallel, in many respects, with the account given of the manner by which Saul was chosen king of Israel; the standpoint of the narrator is, however, different. The elders of Israel said, "Give us a king to judge us." When Samuel tried to dissuade them they cried the more, "We will have a king over us; that we also may be like all the nations; and that our king may judge us."

An ethical motive may enter into the sense of justice, but it is not necessarily a part of it. Men have a sense of justice and injustice who are strangers to ethical promptings. Gaius on Justinian says, "Justice is the continual desire of always rendering to each one that which is his due." And again, "The maxims of the law are: to live honestly, to hurt no one, to render to each one his due." We see the various labor organizations and the woman suffragists, especially in England, to mention no others, insisting and persisting that they are demanding justice and nothing but justice, and that laws should be enacted as a means of securing the end they are striving for. Herbert Spencer seems to find the germ of the idea of justice in the desire for revenge. Albeit, the conception of justice is not coterminous with the desire for revenge. The latter is always the more powerful motive. We can study its operation among schoolboys. Sam and Harry are good friends. But one day, when Sam is passing along the street, Harry, seized by a sudden spirit of mischief, hits him with a snowball. Sam's dignity is insulted and he determines to get even,

and when an opportunity occurs hits him with a much harder ball. Sam now thinks Harry a fool for getting mad about a little matter, and plans a still worse trick. Among boys such an affair can never go very far; on the other hand, vendettas and blood-feuds are a serious matter. How they often end is dramatically told in "Stringtown on the Pike." We may study the operation of the same feelings in the history of the ancient Greeks. There, however, retaliation took a twofold form. It was expressed in the formula: Outdo an enemy in injuries and a friend in benefits. In the second case gratitude becomes an important factor, and ethical in form if not in content. Ethical aspirations bear the same relation to individual acts that the aroma does to flowers. Just as most flowers are without fragrance or with little but are nevertheless beautiful, in like manner many deeds that are without an ethical factor nevertheless win our admiration. The father who metes out justice to his son exactly as he would to a stranger, that is, acts without personal bias where the temptation is particularly strong, wins our approval because we see that he has acted justly; nevertheless he does not arouse our enthusiastic admiration to the same degree as does the person who sacrifices his life for a friend or a cause where the sacrifice can have no possible advantage for him.

It is by no means certain that legislation has any influence on the growth of ethical principles. These were the same under Hammurabi that they are under President Roosevelt. Laws, on the other hand, are continually changing. There has been a gradual approach to securing justice for every man in the body politic, although it is probable that there have been frequent retrogressions. It was a capital offense under Henry VIII, under Queen Anne, and under George IV, to steal an article of the value of five shillings; yet convictions became rarer and rarer until they ceased altogether, because juries had gradually come to feel that the theft of a piece of property of small value was a trivial offense compared with

the murder of a human being. It may be that after several generations have been constrained by law to act ethically, their successors will come to feel ethically; but progress, if there be any in this respect, is very slow. The most ancient laws that have come down to us reveal a striking desire on the part of the lawgiver to do justice, sanguinary as many of them are. The difference, compared with our own time, is much more in the application than in the spirit. Man has always had a clear recognition of a distinction between right and wrong, between justice and injustice. Time and experience have done little more than to readjust the relation of the parties in interest. A remarkable example of the tardiness of jurisprudence compared with the growth of the feeling of justice is related by Tacitus. A rich citizen had been assassinated by one of his slaves. According to law, all his fellow-slaves had incurred the penalty of death. The number in this instance amounted to several hundred. A minority of the senators strenuously objected to the execution. Even the rabble rose in mutiny against an atrocious law, and it could be carried into effect only with the aid of the imperial guard. Says M. Denis (*"Histoire des théories et des idées morales"*) in commenting on this incident: "Ainsi cette canaille la plus vile de l'univers au point de vue politique . . . se montrait dans sa simple conscience plus juste and plus humaine que la loi, que les princes, que les sénateurs et les juristes. Elle sentait ce qu'il y a d'horrible et de monstrueux dans ces exécutions en masse. Mais ce qu'elle ne comprenait pas, ce qu'elle ne pouvait comprendre, c'est que de telles horreurs fussent nécessaires à l'inviolabilité de l'injustice érigée en droit, et que cette nécessité fût la condamnation la plus terrible et la plus solennelle d'une institution, à laquelle n'osaient même pas toucher ceux qui se font gloire de gouverner les hommes."

Alexander Hamilton says: "Justice is the end of government. It is the end of civil society. It has ever been

and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." Justice, being a corporate virtue, must always remain to a greater or less extent an unrealized ideal. On the other hand, a purely ethical ideal may be realized because it is individual. A man or a few men may retire into solitude because they are unable to resist the passions and allurements engendered by society, or for the purpose of fortifying themselves for such resistance by contemplation. Justice can take little account of motive in meting out rewards and punishments. Two murders may differ a good deal in the degree of heinousness, but the judge can only inflict one penalty. It must be admitted, however, that according to the medieval conception of justice, death could be made more terrible by the tortures which preceded it. Even the ruthless slaughter of the Roman slaves above referred to does not awaken in the mind of the modern reader such painful feelings as the account of the manner in which the death sentence was executed upon the murderer of Henry IV. It needs to be said, however, that according to the recent German code the judge shall endeavor to discover what is right, just and equitable in any particular suit brought before him, and decide accordingly. In other words, mere technicalities are not to stand in the way of a decision on the merits of a case. Two persons may steal a piece of property of exactly the same value under what seem to be precisely the same external conditions. They will therefore be guilty of the same offense and merit the same punishment, yet intrinsically there may be a wide difference in their guilt. The same may be affirmed of falsehood. We are treading on dangerous ground when we say that a lie is sometimes justifiable, yet we need not go far afield to find instances in which the end sought through deception was intrinsically good. Abstractly considered, justice aims at putting all men on an equality before the law and according to them equal treatment. But by all men we do not mean everybody, without exception; this would

often work injustice. What is justice for a native South African is not necessarily the same thing for a European. On this theme a great deal of sentimental twaddle has been spoken and written. In like manner, treatment accorded to a child may be perfectly just while an adult dealt with in the same way would be wronged. Conditions, the degree of enlightenment and intelligence, must be the criterion so far as may be, and the deciding factor. The law may often deal unethically with a culprit; but if it deals justly, so far as human foresight goes, it has reached the limit of its possibilities. Kant says that "Ethics, as distinguished from Jurisprudence, imposes on me the obligation to make the fulfilment of a Right a maxim of my conduct." Among the most intelligent persons in every community there are those with whom *legal* and *illegal* are synonymous with right and wrong, and whose ethical promptings are so feeble as to be scarcely discernible.

The course of human events exhibits some remarkable ethical revivals, characterized by widely diverse initial impulses. The earliest seems to have taken place in Palestine. Another, in the sixth and fifth centuries B. C., swept from China to Italy. It is associated with the names of Confucius, Gautama, some of the Hebrew prophets, with Solon, Zaleukos and Pythagoras. In India and China it was non-religious. In Palestine it was monotheistic; in Greece and Italy it was polytheistic. In Asia it was non-political; in Greece and Italy it was both social and political. Another revival, of more limited extent but of greater intensity, originated with Jesus and Paul in Palestine; but during the whole second century it was very pronounced in the entire Roman empire. For more than a thousand years thenceforward conditions apparently kept growing almost steadily worse. Morals were probably never lower in Europe than during the later Crusades. There was little progress outside of England until the beginning of the nineteenth century, when Protestant missions began to attract a

good deal of attention. They were, however, for a long time religious rather than ethical. More recently the missionary movement in its widest sense has been primarily social and economic, with a considerable admixture of ethical instruction.

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A NEW TYPE OF NATURALISM.—MONTGOMERY.

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DOCTOR MONTGOMERY'S book¹ is hardly receiving the attention it deserves. This may be in part because of the peculiar style in which it is written, and in part because of the novelty of its philosophical positions. The style cannot indeed be called simple, and easily repels the average unphilosophical or even philosophical reader; yet the language itself is singularly precise and, oddly enough, is rich in images and often highly picturesque, revealing a sensitive and essentially poetic nature. The intellectual standpoint differs both from classical idealism and from ordinary realism; the author, too, is not in harmony with prevailing views in physical science. The reviews the present writer has happened to see in American philosophical journals are lamentably superficial, or even inaccurate, one comparing the author's dualism to Locke's, another practically identifying his views with materialism. The only critiques showing any insight have been in the *Revue de Métaphysique et de Morale*, where points of contact with Bergson's "l'Évolution créatrice" are noted and the exact contemporaneousness of the two works is remarked

¹ "Philosophical Problems in the Light of Vital Organization," by Edmund Montgomery. G. P. Putnam's Sons, New York and London, 1907 (8vo, pp. 446).